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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 457

GUS KOTTEAKOS AND MICHAEL LEKACOS

v.

UNITED STATES OF AMERICA

No. 458

NATHAN REGENBOGEN

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 1294–1300) has not yet been reported.

JURISDICTION

The judgments of the circuit court of appeals were entered August 7, 1945 (R. 1300–1301), and petitions for rehearing were denied August 28,

1945 (R. 1302–1303). The petition for writs of certiorari was filed September 26, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether there was a fatal variance between the indictment, which charged one conspiracy to violate the National Housing Act by making fraudulent applications for loans, and the proof, which established that different groups of defendants operated through the same central figure in making the applications.

STATEMENT

Petitioners and others were indicted in the United States District Court for the Eastern District of New York under Section 37 of the Criminal Code (18 U. S. C. 88) for conspiracy to make fraudulent applications for loans in violation of the National Housing Act and regulations issued thereunder (R. 1–16). Of the thirty-two defendants named in the indictment, seventeen were tried (R. 20). The case was severed as to one and verdicts of acquittal directed as to three (R. 20–21). Of the remaining thirteen, two were acquitted, the jury disagreed as to four, and the remaining seven, including

petitioners, were convicted (R. 1285–1286). Petitioners were each sentenced to imprisonment for one year and three months (R. 24). On appeal to the United States Circuit Court of Appeals for the Second Circuit, the judgments were affirmed (R. 1300–1301).

The evidence against petitioners may be summarized as follows:

Simon Brown, president of the Brownie Lumber Company, undertook, for a fee, to negotiate F. H. A. modernization loans through various banks (R. 356–359). In placing the loans, Brown knew that the borrowers did not intend to use the proceeds for the purposes specified in the applications (R. 361–367).

In 1939, Brown met petitioner Lekacos, who stated that he wished to make a loan in order to open up a law office (R. 388). Lekacos applied for a loan for the alleged purpose of modernizing a house belonging to his father's estate. Some of the repairs stated in the application to be the purpose of the loan had been made the year before. (R. 388–390.) Subsequently Lekacos presented to Brown an application in the name of his brother, Theodore, and his brother's wife, for another loan on other premises (R. 379–380). Lekacos endorsed his brother's name on the check given for such loan and, through Brown, had it cashed by a professional check casher (R. 284–286). When the check was rejected by the bank

on which it was drawn, Lekacos' brother signed a pre-dated power of attorney giving Lekacos authority to sign the check (R. 383–386). One contractor testified that he had performed no work for Lekacos (R. 176–178), and one that he had performed minor repairs for which he had been paid $40 (R. 259–261).

Anatasios Gerakeris, a defendant who pleaded guilty, testified that Lekacos told him that he could get a loan if he would make an application therefor in the name of Louis Gerakeris, his brother, who owned a house (R. 300–302). The application, filled out in the name of Louis and his wife, was sent to Brown by Lekacos (R. 302–303, 392). When the check for the loan was received by Brown, Anatasios Gerakeris, in the presence of Lekacos, signed it as Louis Gerakeris, and a friend, Mrs. Vendicos, endorsed it as Louis' wife (R. 304–307, 392–393). Brown gave $700 of this money to Lekacos and Mrs. Vendicos in cash, and the balance to them in post-dated checks (R. 305, 394). In time, Gerakeris received almost the full amount of the loan (R. 306–307).

In July 1939, Lekacos sent Brown an application for a loan signed by petitioner Kotteakos (R. 436–437). This application contained a number of false statements (R. 1049–1050, 1062–1064). Brown placed the loan, and thereafter Kotteakos sent Brown a number of applications for loans on behalf of other persons. Kotteakos also bor-

rowed $800 in his own name for Brown's personal use. (R. 440–442, 446–447.) Among the applications sent to Brown by Kotteakos were one in the name of John and Mary Tierney (R. 454–456) and one in the name of Joe and Lena Sandes (R. 457).[1] No such persons existed (R. 178–179, 458–459, 712–713, 735, 811–812, 945–949). Brown's assistant, Mr. Shapiro, received the Sandes check, with endorsements on it, from Kotteakos and had it cashed by a professional check cashier. Shapiro gave the proceeds to Kotteakos and petitioner Regenbogen, a partner of Kotteakos in the cigarette vending business (R. 1099), who was with Kotteakos at the time (R. 664–670; see also R. 461–463). The Tierney check was cashed by a Mr. Vassar, who bought vending machines owned by Kotteakos and Regenbogen, and the cash for that check was given to the two partners (R. 717–720). A loan for $1,800 in Regenbogen's name had previously been placed through Brown. Regenbogen repaid the loan about three months after receiving the money. (R. 450–453.)

In addition to the testimony relating to petitioners, Brown testified to loans made to various other persons named as defendants (R. 358–379, 395–413, 416–436, 463–465). His testimony as to the fraudulent nature of such loans was corroborated in some instances. Thus, there was testimony that

[1] In October 1939, Regenbogen, using the name of Joe Sandy, rented telephone service for a company known as the Regal Trucking Company (R. 280–283).

the work specified as the purposes of the Harris, Litvin, and Wolf loans had not been performed (R. 175–176, 707–708, 754–755, 758–760); testimony by Dvorkin, a defendant who pleaded guilty, that defendant Posner had told him that he could obtain a loan for business purposes through Brown (R. 798–803); and admissions made by some of the defendants to investigating officers (R. 861–867, 897–898). On cross-examination, Brown testified that most of these transactions were independent of each other and that various defendants did not know each other (R. 560–564, 600, 608).

In submitting the case to the jury the judge charged:

> The indictment charges but one conspiracy, and to convict each of the defendants of a conspiracy the Government would have to prove, and you would have to find, that each of the defendants was a member of that conspiracy. You cannot divide it up. It is one conspiracy, and the question is whether or not each of the defendants, or which of the defendants, are members of that conspiracy.
>
> You must consider this case as to each defendant separately, because it is, in effect, a separate charge against each defendant, and, therefore, you must consider the case of each one of them separately in arriving at your verdict. (R. 1245.)

Subsequently, in relating the evidence to this charge, the judge stated:

The Government contends, and they have offered evidence to show, that Simon Brown was the pivot around which this whole conspiracy revolved. Have they shown that to your satisfaction? If they have, then we advance another step. What was the relation between the several defendants? Did the defendants Michael Lekacos, Louis Levine, Gus Kotteakos, Max J. Posner, James Secular, Nathan Regenbogen, bring applicants or applications from any of these defendants to Brown? Were any of these men acquainted with each other? Had they obtained loans for themselves, and after they had them, had they obtained loans for somebody else?

That is the question. You have the evidence. It is certainly not all admitted. You have heard it explained to you.

But if that be true, that these men were getting people to come in with Brown, then it is for you to say whether you do not find streams running through each of them to Brown, and that all of those streams led in a common direction, and they are carrying craft destined for the same place. That is the question.

At least one of these applications was given to somebody. I think there was one given to Brown himself, but you can remember that. In reference to the others did they come to Brown through the agency, or through the introduction, or

through the act of solicitation of those applications by any of the men that I have mentioned?

That is important. It is important because the allegation is a conspiracy, and there must be a common purpose shown. Was that a common purpose that was intended to be accomplished, and was the conspiracy to do these things, to violate the law and to perpetrate a fraud against the Government, participated in by any or all of these defendants and did they bring others, or any of the others, to Brown? That is the question.

* * * * *

Take each defendant. Take the part they played. Did any of them sign any papers, applications, notes or checks with the intent, and, of course, with the knowledge—with the intent to commit a crime in violation of the Federal Housing Act, or with the intent to defraud the Government, and did they do that as a result of a predetermined intent and membership in a conspiracy to accomplish those things? (R. 1253–1254.)

ARGUMENT

The evidence in this case establishes beyond a doubt that, as charged in the indictment, petitioners conspired with Brown to violate the National Housing Act by making fraudulent applications for modernization loans. The indictment, however, charged one conspiracy, whereas the evi-

dence as a whole reveals a picture which could aptly be diagrammed as a wheel with Brown as the hub and various groups of defendants as the spokes.[2] We agree with the court below that this evidence does not establish one common conspiracy among the defendants making up the spokes of the wheel, but we think, as did the court below, that the variance did not affect the substantial rights of petitioners and hence does not present grounds for reversal. *Berger* v. *United States,* 295 U. S. 78, 82.

a. The separate conspiracies proved clearly fall within the framework of the indictment, which charged that the defendants were members of a conspiracy to violate the National Housing Act by making false and fraudulent statements in applications for modernization loans (R. 4–5); that, as part of the conspiracy, the defendants would falsely represent the credit rating and financial assets of themselves and of other persons seeking to obtain loans, and would use the proceeds of such loans for purposes other than those specified in the applications (R. 7). This was the very nature of the conspiracy proved against petitioners.

[2] It is to be noted that the evidence shows that these particular petitioners were closely linked with each other. Lekacos placed Kotteakos' first loan, and he introduced Kotteakos to Brown. Kotteakos placed the Regenbogen loan through Brown, and Regenbogen and Kotteakos acted together in the Tierney and Sandes loans. These circumstances indicate the existence of a conspiracy *inter sese* among these petitioners and Brown.

The indictment also alleged an overt act performed by each of the petitioners, as well as acts performed by other persons who were tied to the particular conspiracy, the particular spoke of the wheel, of which petitioners were a part. As to petitioner Lekacos the indictment charged as overt acts his application of May 2, 1939 (Overt Act 12, R. 10), his meeting with Gerakeris (Overt Act 20, R. 12), and the acts of Gerakeris in meeting Brown and signing his brother's name to the check received for the loan (Overt Acts 21 and 22, R. 13). As to petitioners Kotteakos and Regenbogen, the indictment alleged as overt acts the signing by Kotteakos of the application for his first loan (Overt Act 17, R. 12), the signing by Regenbogen of his application for a loan (Overt Act 18, R. 12), the receipt by both of these petitioners of the proceeds of the Sandes loan (Overt Act 15, R. 11), and Brown's presentation of the Tierney application (Overt Act 16, R. 11). It is to be noted that all these overt acts were significant acts in furtherance of the particular conspiracy in which petitioners participated and that all of them were established by the evidence.

b. The judge's charge that "The indictment charges but one conspiracy * * *. You cannot divide it up," must be considered together with the subsequent portion of his charge, quoted at pp. 7–8, *supra*, relating this general instruction to the evidence in the case. The judge in substance

told the jury that they must find a conspiracy tying each of the defendants to Brown, i. e., "it is for you to say whether you do not find streams running through each of them to Brown." He further charged that, as to each defendant, the jury must consider whether he signed documents with intent to violate the Housing Act as the result of a predetermined intent to defraud and complicity in a conspiracy to accomplish such purpose. It is thus evident that, although the judge wrongly assumed that if all the defendants dealt through Brown, one conspiracy would be established, he required the jury to find facts which would necessarily establish that each defendant was an active participant in a lesser conspiracy with Brown before he could be convicted. In view of the judge's explicit instruction as to the facts which would properly establish guilt, we do not think his improper characterization of the facts as constituting one conspiracy can in itself be considered prejudicial.

c. Throughout his charge, the judge emphasized the fact that the jury must consider the case against each defendant separately and determine whether each defendant was a member of the conspiracy (R. 1245, 1249, 1252–1253); that "Of course, if you should find that any one of them was not a member of the conspiracy, then it would not make any difference, because that would be the end of it as far as that one was concerned" (R. 1249). Considered in relation to the facts of this case,

particularly as to petitioners all of whom, through Brown, received loans on the basis of fraudulent applications, we think that this continued admonition first to consider whether each individual defendant was independently connected with the conspiracy removes any possibility of prejudice from the judge's other instructions, of which petitioners particularly complain (Pet. 17–22), that only one overt act need be proved and that, if membership in the conspiracy was established, the acts of one defendant could be imputed to all (R. 1249). As we have shown (*supra,* p. 10), the overt acts charged to petitioners were all acts of direct participation in a conspiracy—fraudulent applications for the loans and receipt of the proceeds. It is inconceivable that the jury could have found that petitioners joined a conspiracy without finding that each of them performed at least one of the overt acts charged against him. And, having found that much, the jury at that point must necessarily have found petitioners guilty without being obliged thereafter to impute to petitioners the acts of others. This is not a situation in which there is only slight evidence of participation on the part of a defendant and where, on the basis of such slight connection, the acts of others must be considered in order to establish guilt beyond a reasonable doubt. Here, the acts which proved membership in the conspiracy consisted of acts of direct participation which in themselves established guilt.

This Court has declared that a variance between an indictment which charges one conspiracy and proof which establishes several conspiracies is immaterial unless the substantial rights of the defendant are affected. *Berger* v. *United States,* 295 U. S. 78, 82. Under the narrowest construction of that doctrine we think it must be shown that there is at least a reasonable likelihood that the variance or the error might have influenced the jury's verdict. In this particular case, where the testimony as a whole, the express statements by Brown on cross-examination, as well as the judge's charge to which we have referred, made it abundantly clear to the jury that the various groups operated separately, meeting only at the center, it is in the highest degree unlikely that the jury could have based its findings of petitioners' guilt on acts performed by other independent groups, particularly since the evidence that petitioners conspired with Brown consisted of acts of direct participation proved by clear and convincing evidence. While numerically the number of conspiracies proved in this case may be greater than the number proved in other cases in which variance has unsuccessfully been urged as a ground for reversal, the pattern of the evidence in this case is actually much simpler and hence the danger of confusion much less. Cf. *Berger* v. *United States,* 295 U. S. 78; *United States* v. *Liss,* 137 F. 2d 995, 998 (C. C. A. 2), certiorari denied, 320 U. S. 773; *Chadwick* v. *United States,* 117 F.

2d 902, 904 (C. C. A. 5), certiorari denied, 313 U. S. 585; see also *United States* v. *Cohen*, 145 F. 2d 82, 89 (C. C. A. 2), certiorari denied, 323 U. S. 799. Under the circumstances we think that the error of the trial judge in characterizing the multiple conspiracies here proved as a single conspiracy amounts to no more than a misnomer and that there is no such reasonable probability of prejudice as would warrant the reversal of merited convictions.

CONCLUSION

The case involves only the application of settled principles. We submit that when the record is considered as a whole petitioners are shown not to have been prejudiced by the variance and that the petition for a writ of certiorari should be denied.

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